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IN THE

Supreme Court of the United States

October Term, 1971

No. 35977

ESTATE OF ESTHER ZAHN,
Deceased.
MARGARET ZAHN, PAUL ZAHN and OTTO ZAHN,
Plaintiffs and Appellants,
vs.
SECURITY PACIFIC NATIONAL BANK, Executor, THE SALVATION ARMY, and THE STATE OF CALIFORNIA,
Defendants and Respondents.

PETITION FOR CERTIORARI TO THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION 4, STATE OF CALIFORNIA.

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PETITION FOR CERTIORARI TO THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION 4, STATE OF CALIFORNIA.

To the Honorable Warren Burger, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States:

Your petitioners, the heirs at law of Margaret Zahn, deceased, respectfully petition this court for a writ of certiorari, directed to the Court of Appeal,

Second Appellate District, Division Four, State of California, to review and reverse a degree of distribution which construes the holographic will of the decedent to provide for housing with a restricted religious and racial covenant and a covenant restricting occupancy "to women, to native Californians and to Christian women and girls who have no relatives, no smokers or drinkers, only deserving citizens who are native Californians."

Although the will was non-charitable on its face, the California courts construed it as having a general charitable intent, rewrote the will as did the Secretary of the Interior in Tooahnippah, petitioner, v. Walter J. Hickel, secretary of the Interior 25 (L. ed) (2) 600, and gave the property to the Salvation Army, amounting to about $700,000, depriving the heirs at law of it.

The courts below also ignored the challenges of the heirs at law that the provisions of the will requiring the proposed housing to have restrictive covenants limiting their use to women and girls of the Christian faith and to native Californians violated the commerce clause and fair housing laws guaranteed by the United States Constitution, by the due process and equal protections clauses of the Fourteenth Amendment U.S. Constitution, and by Section 53 of the California Civil Code.

The California courts implicitly held that these holdings were not against public policy, and that the

will, as thus construed and applied, did not violate the fair housing act of the United States, nor due process of law or the equal protection of the laws guaranteed by the Fourteenth Amendment U. S. Constitution. It arbitrarily and capriciously took the property and gave it to the Salvation Army, a proselyting organization for the Christian religion.

JURISDICTION

Jurisdiction is conferred by Title 28, Section 1257, U. S. Codes, and the Rules of the Supreme Court of the United States.

The judgment of the Court of Appeal was rendered on March 18, 1971. Thereafter a petition for rehearing was duly and regularly filed in that court and denied by that court on April 7, 1971.

Thereafter, a petition for hearing was filed in the Supreme Court of California and the Supreme Court extended the time within which to rule on the petition to June 16, 1971. The Supreme Court actually denied the petition for hearing on May 26, 1971.

This petition for writ of certiorari is being filed herein within 90 days of the court's order denying a hearing.

OPINION BELOW

The opinion of the Court of Appeal, Second Appellate District, Division Four, State of California, is contained in Appendix A hereof and incorporated herein by reference. Also the petition for hearing in the Supreme Court of California containing the challenges to violations of federal Constitutional rights which the State denied.

A certified copy of the order of the Supreme Court of California is contained herein as follows:

Order Due
June 16, 1971

ORDER DENYING HEARING

AFTER JUDGMENT BY THE
COURT OF APPEAL
2nd District, Division 4, Civil No. 35977
IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA
IN BANK

ESTATE OF ZAHN, Deceased;
SECURITY PACIFIC NATIONAL BANK,
AS EXECUTOR, ETC.
v.
ZAHN ET AL.

Appellants' petition for hearing DENIED.

[Filed May 26, 1971, G. E. Bishel, Clerk, S.F. Deputy].

I, G. E. BISHEL, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court as shown by the records of my office.

Witness my hand and the seal of the Clerk this 20th day of August, A.D., 1971.

Clerk
By R. JOHNSON, Deputy Clerk
WRIGHT, Chief Justice

THE FACTS

Esther Zahn, a single lady of astute financial ability, and perhaps with a religious prejudice against non-Christians and men, amassed a fortune of $622,-523.13 consisting of cash, notes secured by trust deeds and real estate. This has increased since her death to about $700,000.

She lived in a house at 3503 South Flower street, Los Angeles, about a block from the University of Southern California. Her father and mother had lived there before her.

She wrote a holographic will in which she said she wanted to have a rest home started on the property for women and girls "who were Christians" only with no relatives and who were native Californians. The proposed housing had restrictive covenants excluding males, non-Christians, women and girls with relatives, women who smoked or drank or were not native Californians.

Before Miss Zahn died, August 3, 1967, the Hoover Redevelopment project for the University of Southern California designated her property, along with others for their acquisition. Miss Zahn had visited the agency and apparently submitted some prospectus to rebuild on her property but never went forward with her plans before she died. The redevelopment agency acquired her property.

On May 31, 1968 Mr. Marcus Muskat, attorney, on behalf of the executor, filed a petition to determine

interest in the estate (R.T. 48). The heirs at law live in Germany. They filed their statement of interest and attorney H. A. Gebhardt, an expert on German law, gave his opinion that the heirs at low could receive the property from the United States from California. (*Zschernig v. Miller,* 389 U.S. 429, 19 L.ed. 2d 688) (R.T. 59). Thereafter this issue did not arise.

What did arise thereafter was whether the will contained provisions to build housing only to be rented and occupied by women and girls, only of Christian faith and religious restrictive covenants. Whether such provisions void the will as being in violaton of the due process and equal protections clauses of the Fourteenth Amendment and in violation of Section 53 of the California Civil Code and further whether the will containing these provisions had a general charitable disposition and entitled the trial Judge to substitute his opinion for the specific provisions of the will.

The Salvation Army intervened and became a party in the action. They were not an heir nor was the Attorney General. On its face, the will contains no charitable intent or disposition and only names a bank as executor.

Under the law of the State of California, when property is taken for a public use Section 2279 of the Civil Code extinguishes a trust by "such object becoming impossible or unlawful."

The issues involving the violation of U. S. constitutional rights of the petitioners were raised throughout the trial and in the Court of Appeal and the challenges of each were denied by the Court of Appeal and by the Supreme Court of California.

Esther Zahn's holographic will of 1960 of two pages on May 12, 1960, in a firm handwriting. This holographic will reads as follows:

THE HOLOGRAPHIC WILL

I, Esther Zahn of 4701 Keniston Ave. Los Angeles, California, make and publish this is my last will and Testament as follows:

I revoke all other wills and Codicils heretofore made by me and appoint the Farms Merchants National Bank, corner 4th and Main St., Los Angeles, Cal. as Executor of this will.

I want to *start* a Rest Home at the corner 3503 So. Flower St. Los Angeles, California for *Christian women and girls* who have no relatives, no smokers or drinkers only deserving citizens who are Native Californians. Perhaps the Salvation Army can recommend them. I would like a new Modern Building to be erected at the corner of 3503 So. Flower St. Los Angeles, Cal to be called "The Zahn Memorial." This in memory of my father and mother Paul and Louisa Zahn who came to Los Angeles Cal in 1887. There are enough 1st Trust Deeds and real Estate to sell and money to start a new Building.

My home at 4701 Keniston Ave., Los Angeles, Cal. not to be sold. I wish to will to the Salvation Army to be used as a Music Home for Deserving *Christian Students* in my memory.

Have relatives in Germany. Only 1st 2nd and 3rd Cousins. I will them Care Packages or $10 per month as long as they live, if they need help.

August Manson, my caretaker at 4701 Keniston Ave., Los Angeles, Cal. $5,000 cash. He takes care of my 10 Birds and One Dog Misty Fox Terrier.

Executed at Los Angeles, California, this 12th Day of May, 1960.

Esther Zahn

The petitioners incorporate by reference the matters and argument set forth in the petition for hearing in the Supreme Court of California and also arguments in the appendix in the Court of Appeal.

QUESTIONS PRESENTED

1. Whether a will leaving money and property for housing to be built after death which contains restrictive covenants as to the use of the housing, limiting such use solely to Christian women, who do not smoke or drink and who are native Californians, is void because the restrictive provisions are contrary to U. S. Constitutional provisions Article 1, Section 8, Sub 3 of the Commerce Clause (*Atlanta Motel vs.* U. S. 379 U.S. 241) and the due process and equal

protection clauses of the Fourteenth Amendment. U. S. Constitution.

2. Whether the restrictive covenants set forth in the will in the housing project or rest home desired by Miss Zahn to be built on her property was State action through the courts within the meaning of the Fourteenth Amendment to the Constitution of the United States and the Fair Housing provisions of the Civil Rights Act of 1964 and therefore in violation of United States Constitution, Article I, Section 8, Subdivision 3 of the Commerce Clause (*Atlanta Motel v. U.S.*, 379 U.S. 241, 13 L.ed. 2d 258) and renders the will void in violation of the Constitution and Laws of the United States.

3. Whether the Court may rewrite such a will containing restrictive covenants or whether such proceedings takes property from the heirs at law without due process of law and equal protection of the law contrary to the Fourteenth Amendment of the Constitution of the United States.

4. Whether such a will limits housing to Christian women and girls is a restrictive covenant barring Jewish women, oriental non-Christian women, non-Christian American Indians, Hindus, and many others non-Christians that could be listed, violate due process.

5. Whether the provisions in the will to provide for commercial, non-charitable housing containing such restrictions also violate Section 53 of the Civil

Code of California and therefore also violates the Fourteenth Amendment to the Constitution of the United States.

6. Whether the taking of the property at 3503 South Flower Street by the Hoover Redevelopment Agency for the University of Southern California and the zoning restrictions regarding 4701 Keniston Avenue, Los Angeles, were governed by Section 2279 of the Civil Code of California, eliminating a trust, if one was intended by the will.

7. Whether the provisions of the will on its face are non-charitable and therefore not subject to being rewritten or taken by a trial Judge from the heirs and given to the Salvation Army.

8. Whether the provisions in the will are so limited to Christian women and native Californians "who do not smoke or drink and who are deserving citizens" that it shows that no general charitable intent was intended and is too limited to constitute a general charity.

9. Whether carrying out or ignoring the terms of the will are state action within the meaning of the Fourteenth Amendment to the Constitution of the United States.

10. Whether the provisions of the will require a structure to be built and restrictions are contrary to public policy and therefore in violation of the due process and equal protections clauses of the Fourteenth Amendment to the Constitution of the United States.

The Hoover Redevelopment order for the taking of the property at 3503 South Flower Street occurred in 1966 and Miss Zahn sought to program a building for the redevelopment of the same but did not pursue it. The Flower Street house was sold for $47,500 and the proceeds added to the rest of the estate. Another property of hers located at 4701 Keniston Avenue, Los Angels, was zoned solely for residence (R.T. 95) and was no longer available as a music center or school as designated by Miss Zahn. The Salvation Army offered to put up a plaque in one of its buildings in Glendale acknowledging the donation from Miss Zahn for the sale of the property.

The heirs at law, through their counsel, also asserted that since no charitable trust was created and a bank was named as executor, and the restrictive covenants voided the will, neither the Salvation Army nor the Attorney General had standing or a right to intervene.

REASONS FOR GRANTING THE WRIT

This case raises important U.S. constitutional and statutory provisions of law in reference to the making and the provisions of a will and its later construction by the courts after the death of the testator.

If a testator makes provisions in his will which are in violation of the Constitution of the United States or the statutes of the state or United States, may the court rewrite the will to its own ideas or has the testator died intestate?

Here the testatrix placed in her will covenants which were plainly racially and religiously restrictive. As such they are against public policy and the Constitution and statutes by provision regarding restrictive covenant and voided the will. The court below chose to rewrite the will ignoring the invalidity which these covenants rendered the will and instead substituted the Salvation Army, a Christian religion proselyting organization in place of the heirs at law who would take it under the California statutes of intestacy.

The Court of Appeal of California seemed to distinguish the restrictive provisions of this lady's will from the restrictive provisions of the will of Senator Bacon of Georgia (*Evans v. Abney,* 396 U.S. 435, 24 L.ed. 2d 634) where the Court held that the will of Senator Bacon involved discrimination between white and black people. This case involves racial and religious discriminations and limitations to Californa Caucasian nativity. Such distinctions make it look like Tweedledee and Tweedledum. Each is a violation of the Constitution and laws of the United States. One discriminates against color; the other agains religion.

In *Evans v. Abney,* 396 US 435, 443, 444, 2d L.ed. 2d 634, 643, the Supreme Court said:

> "No state law or act can prevail in the face of contrary federal law, and the federal courts must search out the fact and truth of any proceeding or transaction to determine if the Consti-

tution has been violated. Presbyterian Church v. Hull Church, 393 US 440, 21 L.ed. 2d 658, 89 S. Ct. 601 (1969); New York Times Co. v. Sullivan, 376 U.S. 254, 11 L.ed. 2d 686, 84 S.Ct. 710, 95 ALR 2d 1412 (1964)."

Also, in the same case the Court points out that Georgia has a cy pres statute. (396 U.S. 435, 440, 441, 24 L.ed. 2d 634, 641) California has no cy pres statute as such. Section 2279 of the Civil Code governs instead.

In the Evans case the Supreme Court said (396 US 435, 441, 442, 24 L.ed. 2d 634, 641, 642):

"But this underlying logic of the cy pres doctrine implies that there is a certain class of cases in which the doctrine cannot be applied. Professor Scott in his treatise on trusts states this limitation on the doctrine of cy pres which is common to many States is as follows:

"'It is not true that a charitable trust never fails where it is impossible to carry out the particular purpose of the testator. In some cases . . . it appears that the accomplishment of the particular purpose and only that purpose was desired by the testator and that he had no more general charitable intent and that he would presumably have preferred to have the whole trust fail if the particular purpose is impossible of accomplishment. In such a case the cy pres doctrine is not applicable.' 4 A. Scott, Law of Trusts § 399, p. 3085 (3d ed 1967).

"In this case, Senator Bacon provided an un-

> usual amount of information in his will from which the Georgia courts could determine the limits of his charitable purpose. Immediately after specifying that the park should be for 'the sole, perpetual and unending, use, benefit and enjoyment of the white women, white girls, white boys and white children of the City of Macon.' the Senator stated that 'the said property under no circumstances . . . (is) to be . . . . at any time for any reason devoted to any other purpose or use excepting so far as herein specifically authorized.' "

Likewise, in the case before this Court it is clear that there was a limited specific intent by Miss Zahn to have a "rest home" as a memorial to her father and mother and a place that she might herself live in a penthouse and that the residence of the place be restricted to *Christian* women and girls who have no relatives, no smokers or drinkers, only deserving citizens who are native Californians. (Par. 3 of the will.)

Like Senator Bacon, Miss Zahn's intent was not charitable and not general, but extended only to the establishment of a restricted residence for the benefit solely of Christian women and girls who have no relatives, no smokers or drinkers, only deserving citizens who are native Californians. Contrary to the finding in the Georgia case, the California court nevertheless wrote into the will a general charitable intent so as to be able to rewrite the will and donate the property to the proselyting Christian Salvation

Army and thus deprives Miss Zahn's relatives of property to which they were entitled.

In addition, the house at 3503 South Flower Street and the land were designated as the exclusive source of payment of the legacy and the gift was therefore specific and when the property was taken by the Hoover Redevelopment there was nothing left and the property was adeemed. (*Estate of Sullivan,* 128 Cal. App. 2d 144, 274 P. 2d 946). In the *Sullivan* case the court said: "Where the proceeds of a particularly designated land are the actual subject of the bequest or where certain land is designated as the exclusive source for the payment of a legacy, the gift is specific. 57 Am. Jur Wills, Sec. 1413."

Ademption is one of the ways a legacy lapses. (*Kramer v. Kramer,* 201 F. 248, 250.)

Instead the Court rewrote the will and took the proceeds and gave it to the Salvation Army, a Christian religious proselyting organization. This violated due process and equal protection forbidden under the 14th Amendment U.S. Constitution and the U.S. Civil Rights Act. of 1964.

WHEREFORE, petitioners pray that this Honorable Court grant certiorari and reverse the judgment.

Respectfully,

MORRIS LAVINE
Attorney for Petitioners